44250-7-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

MARGARET BYERLEY,

Respondent,

v.

JAMES HOWARD CAIL,

Appellant.

BRIEF OF RESPONDENT

DANIEL N. COOK
Attorney for Respondents
Faubion Reeder Fraley & Cook PS
5920 100th St SW Ste 25
Lakewood, WA, 98499-2751

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I. INTRODUCTION

MARGARET BYERLY ("MEG") and JAMES CAIL ("JIM") met in 1995 and dated on and off for about a year and a half. During the process they decided to move in together. They jointly worked with a realtor to select a home together. They moved into the home simultaneously in September 1996. Jim and Meg lived together continuously in an exclusive and intimate relationship for the next 10 years. Ultimately, Jim and Meg married in October 2006. Jim and Meg separated in June 2011. By the date of separation they had resided together continuously for almost 15 years. During their relationship and marriage they acquired two assets of substantial value at issue in this appeal: (1) the family home, and (2) retirement interests of both parties.

Jim is one year younger than Meg. Both parties are healthy and have the ability to work. Due to Jim's much longer work history and higher income while he was working, his income earning capacity and retirement savings are substantially higher than Meg's. Prior to the court's award of a portion of Jim's retirement to Meg, he received more per month than Meg. Although Meg is retirement age, she continues to work. Jim is retired and voluntarily chooses not to work. As a result of these voluntarily choices Jim's net monthly income is lower than Meg's after the court's award of a portion of Jim's retirement to Meg.

Jim believes he should receive the family home because it is titled in his name. Jim incorrectly alleges he was married to a former spouse at the time of acquisition. Jim's prior marriage was dissolved on the same date the deed to the family home in this case was recorded. Jim denies Meg's participation in the home selection process; however, the testimony of the realtor indicates both parties were buyers and documentary evidence shows Meg was intended as a purchaser. Jim disregards Meg's contributions throughout the relationship and seeks all of the equity.

At trial Jim argued Meg was not entitled to any of his retirement benefits earned in the 10 years the parties engaged in a committed intimate relationship prior to the date of their marriage. Jim denied the existence of a committed and intimate relationship prior to marriage. After overwhelming evidence was presented the trial court found all property, including retirement, acquired from the date cohabitation began in September 1996 through date of the marriage and through the subsequent June 2011 date of separation should be divided between the parties. Jim did not assign error to that finding of fact or associated conclusions of law; however, Jim now for the first time on appeal attacks the expert pension valuations that were presented at trial without objection.

Jim misstates the respective economic circumstances of the parties. Both parties earned retirement benefits during the marriage, but Meg was earned retirement only during the latter part of their relationship. Jim earned retirement much longer than Meg, and at a much higher wage so

his retirement savings were much more substantial. It was proper for the Court to value each party's retirement benefits earned during the 15 year relationship and award Meg a portion of Jim's retirement.

Jim's position is grossly inequitable. The trial court properly rejected his position and should be affirmed. This appeal is frivolous. Meg should be awarded her attorney's fees on appeal because there are no legal questions upon which reasonable minds could possibly differ.

II. STATEMENT OF THE CASE

A. Trial Court's Treatment of Family Home as Community Property.

1. Jim and Meg began searching for a home while dating.

Jim and Meg met in April 1995. RP 77. They moved in together in September 1996. RP 77, 111. They married October 20, 2006. They separated June 30, 2011. CP 113 (Findings and Conclusions of Law, 2 Finding 2.4 and 2.5).

When Jim and Meg began dating in April 1995 while Jim was still married but in the middle of a contentious divorce. RP 277-278. They dated for about 18 months with a short break during their dating relationship. RP 77 - 78. During their dating relationship they were frequently physically intimate and spent weekends together but did not live together in the same home. RP 77.

In the summer of 1996, shortly before the dissolution of Jim's prior marriage was finalized, the parties decided move in together. They began

searching for a home to buy. CP 113-114 (Findings, Page 2, Paragraph 2.8(a)(i)). RP 115.

The parties viewed potential homes together and worked jointly with a realtor in the selection process. RP 29, 33-34. RP 115 – 116.

2. The purchase of the home was when Jim was single.

The acquisition of the family home was finalized in September 1996. Meg and Jim did not acquire the home while Jim was still married to his former wife. Jim's prior marriage was dissolved on September 13, 1996. Ex. 25. RP 78. The deed to the home vested title in the name of "JAMES CAIL, a single person" and formally recorded on September 13, 1996, the same day his dissolution was finalized Ex. 31.

3. The purchase of the home was as an intimate couple.

Even though the home was titled in Jim's name, the intent was for Jim and Meg to purchase the home together. RP 111, RP 52 - 53. The realtor viewed both Jim and Meg as buyers. CP 113-114 (Findings, Page 2, Paragraph 2.8(a)(ii)). RP 29, 33-34, 39, 42-44. The parties' realtor characterized them as a romantic couple not business partners. RP 44-45.

Even though the home was titled in Jim's name, Jim and Meg attempted to purchase the home together. RP 111. The Purchase and Sale Agreement named the Buyer of the home as "James Cail and Assigns." Ex. 5. The inclusion of "and Assigns" indicates involvement of another buyer. CP 113-114 (Findings, Page 2, Paragraph 2.8(a)(ii)). RP 38-40, 52 - 53. Meg later signed the Purchase and Sale Agreement as a Buyer. Ex.

5. RP 111 – 112, 39-40. A Preliminary Title Commitment named both Meg and Jim as buyers. CP 113-114 (Findings, Page 2, Paragraph 2.8(a)(iii)). Ex. 4. RP 31-33. Meg's participation in the purchase as a buyer was with Jim's knowledge and permission. RP 38, 40, 48, 63-65.

4. Title was not taken in both names due to financing.

The home was titled solely in Jim's name instead of Jim and Meg's jointly because Meg's credit prevented the parties from securing financing. Findings, Page 2, Paragraph 2.8(a)(iv), RP 111 - 112, 65-66. Even after the sale was completed in Jim's name, the realtor still viewed Jim and Meg both as buyers and sent them a card, acknowledging the difficulties in closing the sale and congratulating them on their purchase. CP 113-114 RP 41-46, 61-62. Ex. 6.

5. Jim and Meg lived in the home continuously over 14 years.

Both Meg and Jim moved into the family home simultaneously in September 1996 and lived there continuously together with no break in their relationship until June 2011. Findings, Page 3, Paragraph 2.8(a)(v). RP 78-79. Meg and Jim established a joint bank account in September 1996 when they moved in and each contributed to the joint account from earnings. RP 109-110. The joint account was to pay the home expenses throughout their relationship. RP 108-111. Meg and Jim conducted themselves as joint owners, improving the property with joint labor and money and paying the mortgage and utilities with joint funds. CP 113-114 (Findings, Page 3, Paragraph 2.8(a)(v)). RP 108-109, 113 – 114, 84.

There was overwhelming evidence of the nature of their committed intimate relationship from the time they moved in together in 1996 until their marriage in 2006:

> The parties' relationship was continuous for 10 years then consummated by a formal marriage. [1]
>
> The parties shared a bedroom, engaged in an intimate sexual relationship, integrated within each other's extended families, by sharing and attending weddings, showers, family vacations and pooled resources.[1]
>
> Meg's grandchildren referred to both Meg and Jim in familial way: Grandma and "Papa." [1]
>
> Published obituaries in the Tacoma News Tribune for both Meg's Mother and Jim's Father, each obituary with reference to the other party as if a spouse even though they were not married at the time. [1]
>
> The parties sent joint Christmas cards each year from "Jim and Meg." [1]
>
> Received house bills, including utilities, in the joint name of both parties and vet expenses directed to "Jim and Meg Cail."[1]
>
> Jim made a romantic proposal of marriage to Meg in 2006, and they purchased expensive wedding rings, and went to Las Vegas for their wedding. [1]

It is undisputed on this appeal that beginning September 1996 Jim and Meg were a committed and intimate couple. Jim formally took title to

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[1] Finding of Fact 2.21, including subparts, at Pages 6-7. Jim has not assigned error to this Finding. See also, Footnote 4, on Page 5 of Appellant's Opening Brief, stating: "Although Jim contested the nature and characterization of his relationship with Meg before their marriage at trial, he does not do so for purposes of this appeal."

the home on September 13, 1996. Ex. 31. Meg also moved into the home in September 1996. RP 78. Brief of Appellant, at Page 3. The trial court concluded: "Property acquired during the parties committed intimate relationship from September 1996 through the date of marriage in October 2006 should also be divided applying community property principles." CP 119 (Findings and Conclusions, Page 8, Conclusion of Law 3.8). Jim has assigned error to the court's characterization and treatment of the home as community property but not to Finding 2.21 or Conclusion 3.8.

B. Trial Court's Division of Pension Benefits.

1. The underlying retirement facts were undisputed.

Both Jim and Meg earned retirement benefits during the relationship. Jim earned retirement through a Union and through the State of Washington. Meg earned retirement only through the State of Washington. RP 157 – 164.

These facts were not in dispute at trial. Neither party elicited substantial testimony on these underlying facts because these facts were undisputed and based upon documentation exchanged in discovery. Neither expert testified at trial, instead both parties relied on their written valuation reports admitted without objection. The evidence clearly shows the uncontested nature of these underlying facts. See RP 159-160.

Ex. 18, 19 and 20 contained the underlying undisputed information supporting the Meg's Expert opinion. Ex. 37, 38 and 40, which are pension valuations from Jim's expert, were admitted in similar summary

fashion. RP 376-379. The following facts contained in and underlying the Expert Valuations at Ex. 18 19 and 20 were based upon information obtained and exchanged in discovery and were not disputed:

> Jim worked for 33.5 years (402 months)[2] in the Union.
> Jim worked for 31.25 years (375 months)[3] for SERS.

Jim's Expert used the same total months of service (375) for Jim's SERS pension as Meg's. Cf. Ex. 38, Page 1, bottom of page. "(30.3 months of svc during marriage / 375 total months of service = 8.35%)".

The difference between Jim's service with the Union and SERS is due to his enrollment in the Union prior to shortly later becoming simultaneously employed in the SERS system. Meg's Expert recognized the difference in length of service and this benefits Jim because the longer service in the Union results in a lower community percentage as follows:

> Meg's Expert calculated the community portion of Jim's Union pension as 37.80% because his Union service (402 months total) only overlapped his cohabitation with and marriage to Meg by 12.75 years (152 or 153 months depending upon how partial months are calculated).[4]
>
> Meg's Expert calculated the community portion of Jim's SERS pension as 40.80% because his SERS service (375 months total) only overlapped his cohabitation with and marriage to Meg by 12.75 years (152 or 153 months depending upon how partial months are calculated).[5]

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[2] See Ex. 18, Page 1, bottom of page: "First reported hours (1976) – Date of retirement (7/1/2009) = 402 months."
[3] See Ex. 19, Page 2, top of page: "(153 months of svc during marriage / *375 total months of service* = 40.80% x $181,999)." (Emphasis added).
[4] See, Ex. 18, Page 2, bottom of page: "Co-habitation (10/31/96) – Date of Retirement (7/1/2009) = 152 months. " ... "Community Percentage = 152 / 402 = 37.08%"
[5] See, Ex. 18, Page 2, bottom of page: "Co-habitation (10/31/96) – Date of Retirement (7/1/2009) = 152 months. " ... "Community Percentage = 152 / 402 = 37.08%"

Contrary to Jim's assertion in his Appellate Brief, Meg's expert did not value Jim's pension using more than 153 months (or 12.75 years) as the denominator. In the case of Jim's Union pension Meg's expert only used 152 months to avoid disputes over partial months.

In contrast to Jim, all of Meg's retirement earned as of the date of separation was community. Meg worked for 6 years (75 months)[6] for SERS. All (100%) of Meg's service for SERS overlapped her cohabitation with and marriage to Jim. Jim argues the Trial Court did not perform the same analysis on Meg's pension, but that is because Meg's pension was all acquired during cohabitation and marriage.

2. The Dispute was Whether Years of Cohabitation Should be Included Not Methodology of the Calculation

Petitioner's Expert Valuation Reports at Es. 18, 19, 20 and Respondent's Expert Valuation Reports at 37, 38 and 40 use the same methodology. Both parties agreed there was a separate property portion of Jim's pensions because they were earned in part before the parties even began cohabitation in September 1996. RP 160, 161, 163. The dispute was whether the retirement benefits divided by the court should include years of **cohabitation** (beginning September 1996), or be limited to retirement earned during **marriage** (beginning October 2006). Compare Petitioner's Trial Brief at CP 26 and Respondent's Trial Brief at CP 43.

[6] See Ex. 20, Page 1, bottom third of page: "1st enrolled 3/1/05. Entire benefit at 6/1/11 is community."

3. The Trial Court Adopted Meg's Expert Valuation With No Mathematical Error by the Expert

The trial court found all retirement acquired during cohabitation and marriage should be treated as community and concluded such portion should be equitably divided. CP 117 – 118 (Finding of Fact 2.21, on Page 6-7) and CP 118 (Conclusion of Law 3.8, on Page 8). In fact, Jim does not assign error to this Finding or this Conclusion. Jim concedes on Appeal the Trial Court properly characterized the nature of the relationship prior to marriage. Brief of Appellant, Page 5, Footnote 4. Hence the Trial Court appropriately divided the pensions earned during the period of cohabitation. Jim now disputes the calculation – but not the conclusion all retirement earned after September 1996 should be divided.

To achieve an equitable division of the retirement interests in conjunction with the other assets, the Trial Court accepted the calculations and valuation of Meg's Expert. CP 61-62 (Court's letter opinion). Ex. 18, 19 and 20. RP 10 (11/16/2012).

Jim criticizes the Trial Court for a mathematical error in the Trial Court's letter decision. CP at 62. This mathematical error was identified in Jim's Motion for Reconsideration. CP 71. The mathematical error did not affect the substantive rights of the parties and was addressed in Meg's Response to Motion for Reconsideration. CP 89 – 91. Contrary to Jim's statement in his appellate brief, Meg never urged the trial court to change it's ruling post-trial. The explanation of the mathematical error cannot be

more simply or clearly explained than Meg's Response to Motion for Reconsideration which is set forth as Appendix A to this Brief. The Trial Court recognized Meg's Response to Motion for Reconsideration accurately explained the mathematical error. RP 4 (11/16/2012).

The mathematical error was not in Meg's Expert valuation or calculation. Compare CP 62 to Ex. 18. The error was simply addition by the Trial Court, not by Meg's Expert, and the mathematical error did not affect either party's rights. On November 16, 2012, the Trial Court addressed the issue of the mathematical error and the explanation outlined by Meg (above) at the hearing was accepted. RP 4-5 (11/16/2012).

4. Valuation of Meg's SERS Pension.

Meg earned SERS benefits for 75 months during cohabitation and marriage. All of Meg's SERS at separation was community property.

Meg earned a future monthly pension through SERS. Meg's monthly defined benefit as of the parties separation in June 2011 was $317 per month.[7] Meg's Expert set the present day value of this future monthly benefit as $35,461. Ex. 20.

Meg's also has a defined contribution component. Meg had $19,771[8] in her defined contribution account in June 2011. Ex. 20.

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[7] Contrast the calculation of $317 by the Plan Administrator using all years from March 2005 through June 2011, in Meg's Expert Valuation, Ex. 20, with the Calculation by Jim's Expert, Ex. 40, of only $172 using only the years after marriage in October 2006.

[8] Contrast the calculation of $19,771 by Meg's Expert in Ex. 20 using all years from March 2005 through June 2011 with the Calculation by Jim's Expert, Ex. 40, of only $10,722 using only the years after marriage in October 2006.

For Meg, the total present day community value, defined as earned between September 1996 and June 2011, of all retirement benefits in her name was $55,232. Ex. 20. As of the date of separation Meg had no separate property retirement benefits as Jim did.

5. Valuation of Jim's SERS Pension.

Jim and Meg lived together from September 1996 through June 2011. CP 117-118 (Finding of Fact 2.21, on Page 6-7). Jim retired effective July 1, 2009. Ex. 18. Thus 153 months (12.75 years) of Jim's employment overlapped the co-habitation and marriage. Ex. 18 and 19.

Jim's total retirement credit under SERS totals 375 months including time before and during cohabitation with Meg. Exs. 19, 38. Based upon 153 of months (12.75 years) of cohabitation, 40.80% of Jim's SERS pension is community. Ex. 19.

Jim earned a monthly pension payment through SERS. The SERS Plan Administrator calculated just the community property portion of the monthly benefits, that is those benefits earned during the period of October 1996 through June 2011, equals $640 per month.[9] Jim's actual benefit is greater than $640 per month, as it includes benefits earned prior to cohabitation in September 1996. Meg's expert opinion was admitted

[9] Contrast the calculation of $640 by the Plan Administrator using all years from September 1995 through June 2011, in Meg's Expert Valuation, Ex. 19, with the Calculation by Jim's Expert, Ex. 38, of only $126 using only the years after marriage in October 2006.

without objection and indicated this $640 per month (the portion earned during the relationship) had a present day value of $125,325. Ex. 18.

Jim has a defined contribution account through SERS. Jim had $181,999 in the SERS defined contribution account in June 2011. Meg's expert opinion, indicating $74,256[10] (40.80% for 153 months together divided by 375 months of employment) of that amount was community, was admitted without objection. RP 161. Ex. 19.

6. Valuation of Jim's Union Pension.

Jim was employed as a Union member and earned a Union pension for a total of 402 months (33.5 years). Jim worked for the Union before and during cohabitation with and marriage to Meg. To avoid any dispute over partial months Meg's expert used 152 months as the basis for his calculation community portion of the Union pension.

Based upon 152 months earned during cohabitation/marriage and 402 total months of Union service, 37.80% of Jim's Union pension is community. The community percentage is slightly lower for Jim's Union retirement in contrast to his State retirement because his total months of service with the Union began sooner and hence were slightly more than his total months employed by the State. Exs. 18 and 19.

The total monthly payment, including community and separate components, earned over the 33 years in the Union is $3,083.83 per

[10] Contrast Calculation of $74,246 by Meg's Expert in Ex. 19 using all years from March 2005 through June 2011 with the Calculation by Jim's Expert, Ex. 38, of only $15,197 using only the years after marriage in October 2006.

month. Only $1,166 per month (37.80%) is community, defined as earned from September 1996 through July 2009 when Jim retired. Meg's expert opinion was admitted without objection and indicated $1,166 per month has a present day value of $170,823.[11] Ex. 18.

7. Combined Values of All Pensions Vastly Favored Jim.

For Jim, the total present community value, defined as earned between September 1996 and June 2011, of all retirement benefits in his name was $370,404 ($125,325 SERS pension, $74,256 SERS defined contribution account and $170,823 Union pension). This $370,404 accounts for less than half (only about 38%-40%) of the present day value of his total retirement. Jim has substantial separate property retirement exceeding the $370,404 calculated as community. Ex.18 and 19.

For Meg, the total combined value of all her retirement benefits as of the date of separation in June 2011 was $55,232 with no other separate property retirement benefits whatsoever.

The economic disparity greatly favored Jim and Meg was the economically disadvantaged spouse. Due to this disparity, Meg, who is a year older than Jim, continued to work through the date of trial. Due to Jim's vastly superior retirement benefits, he had stopped working and was simply enjoying retirement benefits.

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[11] Contrast Calculation of Meg's Expert in Ex. 19, using all years from March 2005 through June 2011 to calculate community portion is $1,166 per month and $170,823 present day value with Calculation by Jim's Expert, Ex. 37, using only the years after marriage in October 2006 to calculate community portion is only $196 per month and $29,007 present day value.

III. SUMMARY OF ARGUMENT

A. The Trial Court Properly Treated the Home as Community

The parties intended and attempted to acquire the property jointly. Title was taken in Meg's name but form of title does not determine its character as community or separate. Property is characterized as of date of acquisition. The parties moved in together and lived continuously in the home as a committed and intimate then subsequently married couple/ In all ways they treated the family home as though they were joint owners. The court properly characterized the family home as community property.

Because Meg and Jim did formally marry this is a dissolution action pursuant to statute. Per RCW 26.09.080 all property, both community and separate, may be divided by the court. Hence, even if the home should have been characterized as separate property the court still had jurisdiction and authority to divide the separate property equity.

Even if the home should have been characterized as separate property mischaracterization is not necessarily reversible error if the overall distribution of property is fair and equitable.

B. The Trial Court Properly Divided the Retirement Interests.

Retirement benefits are property interests. The court should divide retirement benefits acquired during a marriage and any retirement benefits acquired during a committed intimate relationship preceding marriage. Retirement benefits may be permissibly segregated as community or

separate using a fractional approach by dividing the overlapping years of service and marriage/cohabitation by total years of service.

The court may permissibly rely upon expert testimony regarding present day valuation of retirement interests.

A party may not use a motion for reconsideration to belatedly attack expert calculations after trial. A party may not raise new issues on appeal or objections to evidence not raised or objected to at trial.

IV. ARGUMENT

A. Standard of Review

A spouse challenging the trial court's decision in a dissolution action must show a manifest abuse of discretion on the part of the trial court. *In re Marriage of Bowen*, 168 Wn.App. 581, 586, 279 P.3d 885, 888 (2012); *In re Marriage of Landry*, 103 Wn.2d 807, 809-10, 699 P.2d 214 (1985). "An abuse of discretion exists only when no reasonable man would take the position adopted by the trial court." *Morgan v. Burks*, 17 Wn.App. 193, 198, 563 P.2d 1260, 1262 (1977). In other words, the trial court's decision need not be the decision that would have been reached by the reviewing court — it need only be defensible.

Trial court findings supported by substantial evidence will be treated as verities and upheld. *In re Marriage of Thomas*, 63 Wn.App. 658, 660, 821 P.2d 1227, 1228 (1991). Evidence is substantial if it persuades a fair-minded, rational person of the truth of the finding. *In re Marriage of Spreen*, 107 Wn. App. 341, 346, 28 P.3d 769 (2001).

B. Distribution of Property Acquired During Cohabitation Before Marriage

For almost 30 years it has been a matter of well-settled Washington law that when a committed intimate relationship (formerly "meretricious relationship") precedes a marriage, property acquired during the period of cohabitation prior to the marriage courts must be included in a just and equitable division of the property. *Matter of Marriage of Lindsey*, 101 Wn.2d 299, 304, 678 P.2d 328, 331 (1984) (a case where the parties began cohabitating in 1974, married in 1976, then separated in 1981).

Since *Lindsey,* a community property presumption applies to all property acquired during the relationship, including retirement interests. *Connell v. Francisco*, 127 Wn.2d 339, 346, 898 P.2d 831 (1995). See also, *In re Marriage of Muhammad*, 153 Wn.2d 795, 806, 108 P.3d 779, 785 (2005) (affirming principle and specifically indicating retirement benefits acquired during period of relationship preceding marriage should be considered). Even in cases when the parties never marry, the 9th Circuit has held that Qualified Domestic Relations Orders (QDROs) may be entered at the conclusion of a committed intimate relationship even though there is not technically a former "spouse" since they were never married. *Owens v. Automotive Machinists Pension Trust,* 551 F.3d 1138; 1147 (C.A.9 (Wash.)) (2009) (affirming committed intimate relationship principle and holding retirement benefits earned during committed intimate relationships can be divided by Qualified Domestic Relations Order under Federal ERISA law even though parties never marry).

There are some distinctions between remedies available to married couples seeking relief and committed and intimate couples who chose not to formalize their relationship in marriage. See, e.g., *Foster v. Thilges,* 61 Wn.App. 880, 887, 812 P.2d 523, 527 (1991) (attorney's fees may not be awarded in case of unmarried couple as they may in dissolution of a married couple); *Connell v. Francisco*, supra at 349–50, (only joint property, not separate property, available for equitable distribution). In contrast, in a case involving a married couple, attorney's fees may be awarded and all property, including separate property, is before the court for distribution. RCW 26.09.080. *In re Marriage of Konzen*, 103 Wn.2d 470, 693 P.2d 97, *cert. denied*, 473 U.S. 906 (1985); *In re Marriage of Griswold*, 112 Wn. App. 333, 347-48, 48 P.3d 1018 (2002), *review denied*, 148 Wn.2d 1023 (2003).

C. The Trial Court Properly Treated the Family Home as Community

A court must determine property's character as of the date it was acquired. *In re Marriage of Skarbek*, 100 Wn. App. 444, 997 P.2d 447 (2000). Jim accurately states this legal principle. Brief of Appellant, page 11. Jim also accurately states all property acquired during a committed intimate relationship is presumed to be owned by both parties. *Id.* However, this remains true even if the property is acquired in the name of only one spouse—the name in which title is held is not determinative or even good evidence of the character of property as community or separate. Kenneth W. Weber, 19 Washington Practice, Family and Community Property Law, §10.7 (1997); *In re Marriage of Skarbek*, supra at 448; *In*

re Marriage of Hurd, 69 Wn. App. 38, 848 P.2d 185, *review denied*, 122 Wn.2d 1020 (1993).

1. Substantial evidence supports community characterization of home because Jim was not married when it was acquired.

Jim inaccurately asserts he purchased the home in July 1996 while he was still married. Brief of Appellant, page 11.

The acquisition of the family home was finalized on September 13, 1996. The deed to the home vested title in the name of "JAMES CAIL, **a single person**" and was formally recorded on September 13, 1996. Ex. 31. Jim's prior marriage was dissolved on September 13, 1996. Ex. 25. RP 78. Clearly title to the home was **not** acquired while Jim was still married to his former wife. Ex. 31. RP 78.

Jim admitted he was going through a "contentious divorce" when he and Meg began dating. RP 277-278. Meg testified she and Jim rekindled their relationship in December 1995 after she learned that Jim "and his wife were definitely divorcing." RP 77. Meg testified she and Jim were thereafter inseparable. So by July 1996 when the Purchase and Sale Agreement was signed, both Jim and Meg knew Jim was divorcing.

A Preliminary Title Commitment issued on July 22, 1996, listed the proposed insured as: "JAMES H. CIAL [sic] and MARGARET A. BYERLEY, **both single persons**; and KITSAP MORTGAGE." Ex. 4. (Emphasis added). Even though Jim was still legally married at the time the transaction was commenced, from the very outset of the transaction

Jim's imminent divorce was contemplated and title was not actually transferred until he was marriage was formally dissolved and he was a single man. As discussed more fully below, Meg was always intended to be a Buyer from the signing of the original Purchase and Sale Agreement.

The Trial Court's finding the Family Home was acquired when Jim was a single man, or at least when there was no community presumption stemming from his prior marriage, is supported by substantial evidence. Ex. 25, Ex. 31. RP 77-78, 277-278.

2. Substantial evidence supports community characterization of home because Meg was intended as a Buyer.

Meg was intended as a purchaser of the property from the very beginning of the transaction. There is substantial evidence to support this finding. The Purchase and Sale Agreement submitted by Mr. Cail and dated July 18, 1996, named the Buyer of the home as "James Cail and Assigns." Ex. 7. **The testimony of the parties' realtor was that inclusion of "and Assigns" indicates intent to involve another buyer from the very outset. CP 113-114 (Findings, Page 2, Paragraph 2.8(a)(ii)). RP 38-40, 52 - 53.** Meg's participation in the purchase was with Jim's knowledge and permission. RP 38, 40, 48, 63-65.

Without citation to the record Jim makes the blanket statement that the realtor never verified to who the assignment would have been made. Brief of Appellant at page 12. Jim asserts, again without citation to the record, that the realtor's "assumption was incorrect." But this is directly

contrary to the realtor's testimony. The realtor testified that she showed Jim and Meg the house **together before the Purchase and Sale Agreement was originally written.** RP 63.

The realtor testified that a contract might use the language "and/or Assigns" because one party to a contract was not available when the original document was signed. RP 52. Meg testified the original contract was signed while she was working and had a long commute but while Jim had more flexible hours and was more available to sign documents immediately. RP 112. The realtor further testified Meg had in fact been assigned. RP 39 In response to inquiry whether Jim was aware that Meg was added, the realtor testified that he was. RP 40. The realtor testified that as she sat in the courtroom more than 15 years after the transaction was complete she had "No doubt whatsoever" that Meg was the person intended to be the assigned party. RP 65.

Not only did the Purchase and Sale Agreement include the language "and/or Assigns" **but also Meg did in fact sign the Purchase and Sale Agreement as a Buyer on July 24, 1996. Ex. 5. RP 111 – 112, 39-40. The Preliminary Title Commitment named both Meg and Jim as buyers on July 22, 1996. CP 113-114 (Findings, Page 2, Paragraph 2.8(a)(iii)), Ex. 4. RP 31-33.**

The record clearly contains substantial evidence from which a fair minded person could find Meg was intended to be a buyer of this property from the very signing of the original Purchase and Sale Agreement.

3. Substantial evidence supports community characterization of the home because of the nature of the relationship.

i. The Relationship began in September 1996 when Title Was Transferred and the Parties Moved In.

The Trial Court found that Jim and Meg were engaged in a committed intimate relationship at the time the property was acquired, therefore the home is community property. This finding is supported by substantial evidence. Jim asserts to the contrary, stating that: "Jim purchased his home in July of 1996 while he was still married to his first wife and before he and Meg renewed their committed relationship." Brief of Appellant at Page 11. As discussed above, Jim was not married when title was transferred and all parties, including Jim himself, acknowledged that he was in the middle of a divorce at the time the Purchase and Sale Agreement was signed in July 1996. Jim's argument he purchased the home while still married is not accurate or persuasive.

The Trial Court found the parties were in a committed intimate relationship in September 1996 and title to the home was transferred in September 1996. Jim now does not even attempt to argue the Trial Court erred in finding there was a committed intimate relationship beginning in September 1996, even though he vigorously opposed this issue at trial.

ii. Community Characterization is Supported by Substantial Evidence even though the Purchase began in July 1996

The law favors characterization of property as community property. Harry M. Cross, *The Community Property Law in Washington*

(*Revised 1985*), 61 WALR 13, 28 (1986); *In re Marriage of Davison*, 112 Wn. App. 251, 258, 48 P.3d 358 (2002); *In re Marriage of Brewer*, 137 Wn.2d 756, 766, 976 P.2d 102 (1999). Even though the trial court found the parties were in a committed intimate relationship as of September 1996 when cohabitation commenced, this does not preclude a finding that the committed and intimate relationship actually began when the parties were searching for a home to buy and live in together in July 1996. The reviewing court may sustain the trial court on any theory developed by the pleadings and the proof. *Key Development Inv., LLC v. Port of Tacoma*, 173 Wn.App. 1, 22, 292 P.3d 833, 843 (Div. 2 2013); *Matter of Marriage of Foran,* 67 Wn.App. 242, 248, 834 P.2d 1081, 1085 (1992).

Jim now asserts he and Meg were in a committed intimate relationship in September 1996 but not in July 1996 when he signed a Purchase and Sale Agreement for the home. **As discussed extensively above, this is inaccurate. The Trial Court found and substantial evidence supports the fact that Meg was an intended buyer on the Purchase and Sale Agreement from the outset.**

Nevertheless, Jim argues the home was purchased before he and Meg "renewed" their committed relationship. Brief of Appellant at Page 11. Even this contention is not supported by the record. Jim cites CP 36 in support of this contention—but this is Jim's Trial Brief—not evidence. Jim also cites RP 285 and 295-296; however, these pages do not support Jim's contention that he purchased the home before he and Meg renewed

their committed relationship. These pages simply reflect that ultimately the sale was completed and title taken in his name only. But as noted above, the name in which title is taken does not determine the character of the property. *In re Marriage of Skarbek*, supra at 448.

There is ample evidence supporting the fact that Meg and Jim's committed and intimate relationship had already begun when the Purchase and Sale Agreement for the Family Home was signed in July 1996. As early as December 1995 the parties rekindled their relationship and were "inseparable" and "did everything together. RP 77-78. **By the summer of 1996, shortly before the dissolution of Jim's prior marriage was finalized, the parties had decided move in together and they began searching for a home to buy. CP 113-114 (Findings, Page 3, Paragraph 2.8(a)(i)). RP 115.** The parties viewed potential homes together and worked jointly with a realtor in the selection process. RP 115 – 116. RP 29, 33-34. The realtor viewed both Jim and Meg as buyers. CP 113-114 (Findings, Page 3, Paragraph 2.8(a)(ii)). RP 29, 33-34, 39, 42-44. As discussed extensively above, Meg was always an intended buyer of the home as evidenced by the Purchase and Sale Agreement (Ex. 5) and the Preliminary Title Report (Ex. 4). **The parties' realtor characterized them as a romantic couple not business partners. RP 44-45.** Even after the sale was completed in Jim's name alone, the realtor still viewed Jim and Meg both as joint buyers and sent them a card, acknowledging the difficulties in closing the sale and congratulating them

on their purchase. CP 113-114 (Findings, Page 3, Paragraph 2.8(a)(vi)). RP 41-46, 61-62. Ex. 6. The parties moved into the home together after title was transferred in September 1996. CP 113-114. RP 78. RP 279.

Jim cites no support in the record for his contention he purchased his home before he and Meg renewed their committed intimate relationship other title being taken in his name. In contrast, there is substantial other evidence, including testimony from Meg and a non-biased third party witness, as well as commercially generated documentary evidence, that there was a committed intimate relationship in July 1996 at the time the family home purchase was initiated. There is sufficient evidence to convince a fair-minded and rational person that the parties were engaged in a committed intimate relationship beginning with the viewing of potential homes together, joint selection of the home to purchase, working with a realtor together, and both signing a Purchase and Sale Agreement contemplateing both parties as purchasers from the outset.

Even if the reviewing court would have concluded differently, these actions could reasonably be held to be the first steps demonstrating the committed and intimate relationship. *Morgan v. Burks*, 17 Wash.App. 193, 198, 563 P.2d 1260, 1262 (1977). Hence the there is substantial evidence to affirm a committed intimate relationship as early as July 1996.

The trial court specifically considered the purchase of a home together as one factor supporting its finding of a committed intimate relationship. CP 117-118 (Findings, Page 6-7, Finding 2.21 to which no

error is assigned). Jim has substantially changed his position on appeal. At trial he denied the committed intimate relationship at all. He now concedes the relationship existed beginning in September 1996 and denies it existed in July 1996. The trial court did not have an opportunity to rule on the new position taken by Jim for the first time appeal, but it is still appropriate to uphold the court's characterization of the home as community property because the acts leading up to both parties signing the Purchase and Sale Agreement were evidence of the beginning of the committed and intimate relationship in July 1996. *Weiss v. Glemp,* 127 Wn.2d 726, 730, 903 P.2d 455, 457 (1995) ("An appellate court can sustain a trial court judgment on any theory established by the pleadings and proof, even if the trial court did not consider it."), citing, *Hanson v. Snohomish,* 121 Wn.2d 552, 557 n. 10, 852 P.2d 295 (1993).

4. Substantial evidence supports community characterization of the home because Meg was not on title was due to financing.

Jim argues the fact that his name was the only one to appear on title documents demonstrates there was no committed and intimate relationship prior to September 1996 and that Meg was never intended as a purchaser of the property. As explained above, the Trial Court found differently and the findings are supported by substantial evidence. The Trial Court found Meg's name was not included on title due to poor credit and inability to obtain financing. CP 113-114 RP 111 - 112, 65-66.

Even after the sale was completed in Jim's name alone, the realtor still viewed Jim and Meg both as buyers and sent them a joint card acknowledging the difficulties in closing the sale and congratulating them. CP 113-114 RP 41-46, 61-62. Ex. 6. This is one of many reasons why the form of title does not necessarily reflect or determine the character of the property as community or separate. *In re Estate of Borghi*, 167 Wn.2d 480, 489, 219 P.3d 932, 937 (2009) (there are "many reasons" why parties may hold title to property in a manner different from the separate or community character of the property and "[c]ommunity property law and equitable distribution law should adhere to the stated principle that title is irrelevant"). The Trial Court's finding the home did not include Meg's name due to credit issues, and not because it was intended as Jim's sole and separate property, is supported by substantial evidence.

D. Even if the Trial Court Mischaracterized the Home as Community Property the Court has Authority to Divide Separate Property

Jim argues that "property purchased by one of the parties *prior* to a committed intimate relationship is not before the court for distribution" citing *Connell v. Francisco*, 127 Wn.2d 339, 351, 898 P.2d 831 (1995) and *Lindemann v. Lindemann,* 92 Wn. App. 64, 69, 960 P.2d 966 (1998). But this limitation applies exclusively to unmarried couples – not those who later marry. See, *Connell* at 351 (separate property is not before the court for division "for the purpose of dividing property **at the end of a meretricious relationship**") (Emphasis added); *Lindemann* at 68 ([t]here

is no dispute that [the parties] lived in a stable, quasi-marital relationship in which they cohabited knowing a lawful marriage between them did not exist (sometimes archaically referred to as a meretricious relationship).").

Indeed, *Lindemann* distinguishes married couples and unmarred cohabitants and clearly **affirms** that separate property may be divided between married couples:

> **Upon dissolution of a marriage, all separate and community property is before the court for distribution.** A different rule applies upon the break-up of a quasi-marital relationship. To avoid equating cohabitation with marriage, the Supreme Court held in *Connell* that a court may distribute only the property that the cohabiting couple has acquired through efforts extended during the relationship. Separate property is not before the court for distribution.
>
> *Lindemann v. Lindemann*, 92 Wn.App. 64, 69, 960 P.2d 966, 969 (1998) (Emphasis added) (Internal footnotes omitted)

Here, the parties did in fact formalize their relationship in marriage. Accordingly, all property, both community and separate is before the court for distribution. RCW 26.09.080. In this case, because the parties married the court is **not** limited to only dividing property acquired during the relationship. *Lindemann, Id.*

Generally separate property is not divided between the parties. Kenneth W. Weber, 19 Washington Practice, Family and Community Property Law, §10.6 (1997); *In re Marriage of Olivares*, 69 Wn. App.

324, 330, 848 P.2d 1281, *review denied*, 122 Wn.2d 1009 (1993). However, notwithstanding this general principle, separate property of one spouse may be awarded to the other spouse to achieve equity. Kenneth W. Weber, 19 Washington Practice, Family and Community Property Law, §32.9 (1997); RCW 26.09.080; *In re Marriage of Griswold*, 112 Wn. App. 333, 347-48, 48 P.3d 1018 (2002), *review denied*, 148 Wn.2d 1023 (2003); *In re Marriage of Stachofsky*, 90 Wn. App. 135, 147–48, 951 P.2d 346, *review denied*, 136 Wn.2d 1010 (1998); *In re Marriage of Harrington*, 85 Wn. App. 613, 935 P.2d 1357 (1997).

In this case, in light of all of the facts and circumstances set forth above regarding the purchase of the home, the continuous cohabitation in the home since purchase, the treatment of the home as joint owners and the joint contributions to the mortgage and expenses of the home, it is just and equitable to divide the equity in the family home between the parties. Even mischaracterization of property as community or separate does not necessarily require remand when the result is just and equitable. Kenneth W. Weber, 19 Washington Practice, Family and Community Property Law, §32.9 and §51.28 (1997); *In re Marriage of Zier*, 136 Wn. App. 40, 46, 147 P.3d 624 (2006); *In re Marriage of Gillespie*, 89 Wn. App. 390, 399, 948 P.2d 1338 (1997); *In re Marriage of Wright*, 78 Wn App. 230, 896 P.2d 735 (1995); *In re Marriage of Olivares*, 69 Wn. App. 324, 848 P.2d 1281, *review denied*, 122 Wn.2d 1009 (1993). Regardless of whether

the family home is community or separate the Trial Court's award of the family home should be affirmed because the result was just and equitable.

E. The Court Properly Declined Reimbursement for Down Payment.

Without citation to any specific authority Jim argues: "At the very least, the trial court should have reduced the net equity in the home by the amount of Jim's down-payment." Brief of Appellant, page 12. Jim claims in testimony he paid a down payment with proceeds from his life insurance policy. There are no documents tracing these funds from the life insurance to the down payment on the home. Jim claims Meg did not contribute to the down payment of the home but Meg testified that she did. RP 172. In light of the lack of specific documentation from Jim tracing the disbursement of his life insurance proceeds to a down payment on the family home and the conflicting testimony from Jim and Meg regarding Meg's contribution to the family home, it was reasonable for the court to decline to order any reimbursement to either party.

The court's decision was also reasonable in light of the amount in question relative to the size of the overall estate. The down payment issue was raised at the hearing on Jim's motion for reconsideration and the Trial Court, again, denied Jim's request. The Trial Court stated: "[I]t's de minimis in my opinion, given an estate that I valued total at $519,000.00 and divided equally. And so even if I were to consider that, which I'm not going to, it's not sufficient to undo what I've done in the spreadsheet and, again, I'm prepared to enter findings." The Trial Court's order is

reviewed for abuse of discretion and here it is reasonable based upon the evidence presented for a fair-minded person to decline to order any reimbursement to either party.

F. The Trial Court Properly Divided the Retirement Interests in Reliance Upon Uncontested Expert Testimony Segregating the Separate and Community Property Portions of the Retirement

Appellate review of a trial court's division of pension interests in a dissolution is tedious. The standard of review is abuse of discretion and the trial court's decision is rarely changed on appeal:

> We once again repeat the rule that trial court decisions in a dissolution action will seldom be changed upon appeal. Such decisions are difficult at best. Appellate courts should not encourage appeals by tinkering with them. The emotional and financial interests affected by such decisions are best served by finality. The spouse who challenges such decisions bears the heavy burden of showing a manifest abuse of discretion on the part of the trial court. The trial court's decision will be affirmed unless no reasonable judge would have reached the same conclusion.
>
> Appellant does not sustain her burden. We need not extend the length of this opinion by working through the figures except to note that it is possible that the wife receives a higher monthly income than the husband. The distribution that we might have made collectively or individually is not relevant. The trial court carefully analyzed the respective positions of the parties, exercised its discretion and rendered a thoughtful decision. That ends the matter.
>
> *In re Marriage of Landry*, 103 Wn.2d 807, 809-810, 699 P.2d 214, 215 - 216 (1985)

The rule in Washington is that retirement benefits are property and accordingly are subject to equitable division. *In re Marriage of Pea*, 17 Wn.App. 728, 731, 566 P.2d 212, 213 - 214 (1977). In this case the court properly exercised its discretion and made a just and equitable division of the property. Retirement benefits that are earned during a period of pre-marriage cohabitation may be divided along with retirement benefits that are earned during the marriage. *Connell v. Francisco*, supra at 346; *In re Marriage of Muhammad*, supra at 806.

1. The Court Properly Calculated Meg's Pension Interest Using Both Pre-Marriage Cohabitation and Post-Marriage Service

Jim complains the trial court "did not perform the same calculations for Meg's retirement benefits." Brief of Appellant, Page 13. Further, Jim states: "the trial court failed to adjustment [sic] Meg's pension values to reflect the length of the couples committed intimate relationship. CP 61; Ex 40. Instead, Meg's values were based only on the length of the couple's marriage. The trial court's miscalculations created a windfall for Meg." Brief of Appellant, Page 15. **Jim mistakenly cites to Ex. 40 when Ex. 20 was actually adopted by the court.**

The Trial Court's letter decision which Jim cites as CP 61 clearly states "the retirement accounts (acquired after 9/1996) ... are all community in nature." The court makes no distinction between Jim and Meg's retirement accounts. Clearly the court's decision at CP 61 intends to treat both parties the same as to retirement acquired after 9/1/1996.

The court's own spreadsheet prepared in conjunction with the letter ruling (CP 62) assigns the following values to Meg's SERS benefits:

Wife's SERS defined contribution $19.771
Wife's SERS defined benefit.....$35,461

Jim's contention is based upon his erroneous citation to Ex. 40. Ex. 40 is Jim's Expert Pension Valuation. The Trial Court did not adopt the figures calculated in Ex. 40. The Trial Court adopted Meg's Expert Pension Valuation of the Meg's SERS retirement in Ex. 20. Compare:

Ex. 20 SERS defined contribution value $19.771
Ex. 40 SERS defined contribution value $10,722

Ex. 20 SERS defined benefit value.....$35,461
Ex. 40 SERS defined benefit value.....$19,448

Hence comparing CP 62 (the court's spreadsheet) with Ex. 20 and 40 (the two valuations of Meg's pension) the court clearly adopted the valuation by Meg's Expert admitted as Ex. 20.

Meg's Expert included all retirement Meg earned from the date she started service in March 2005. Meg's Expert Pension Valuation states:

"1st enrolled 3/1/05. Entire benefit at 6/1/11 is community."

Ex. 20, Page 1, bottom third of page.

Meg's Expert Pension Valuation **did not** exclude retirement Meg earned during cohabitation prior to marriage. Jim's contention in this regard is factually inaccurate and there is no basis for appeal on this issue.

2. The Court Properly Calculated the Community Interest in Jim's Pension Using 12.75 Years of Service

Jim concedes the typical formula used to determine the total community share of a pension is the months of service during marriage divided by the total months of service at retirement. Brief of Appellant, at page 14. Jim argues only "12.75 years of employment" should be used in the community calculation and the Trial Court "incorrectly established the community and separate percentages of Jim's pensions" and asserts "the Trial Court credited Meg with 15-years of contributions into those pensions based on the length of their relationship. CP 61; Ex. 18, 19".

This time, Jim cites the Expert Valuation adopted by the Trial Court; however, Jim is factually incorrect when he contends the Expert Valuations credit with 15 years of service to the community. **Meg's Expert Valuations at Ex. 18 and 19 never used more than 153 months (12.75 years)** [12] **of service as the numerator of the fraction.** [13] Meg's Expert Valuation indicates the date of *separation* was 6/30/2011 but still limits the numerator to 153 months (12.75 years) during the relationship. Meg's Expert calculation uses precisely the number of years urged by Jim and that is the calculation adopted by the Trial Court. There is no basis for appeal and Jim's brief is factually inaccurate.

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[12] 153 months is equivalent to 12.75 years because 153 months / 12 months in a year = 12.75 years.

[13] More review and analysis of the undisputed facts underlying Ex.s 18, 19 and 20 are presented in Meg's Statement of the Case, above.

3. The Court's Mathematical Error Did Not Affect the Substantive Rights of the Parties

Jim argues a mathematical error by the trial court addressed prior to entry of final orders warrants remand of the decision. This is absurd.

The mathematical error was simple: the court took a number from Meg's trial brief which was based upon certain assumptions in Meg's trial brief, then inserted that number into the Court's spreadsheet at CP 62. But the number the court used from Meg's trial brief was incorrect because the court's spreadsheet at CP 62 did not adopt all of Meg's assumptions in her trial brief, leading to a mathematical (addition) error. **The error did not affect the substantive rights of the parties.** [14] The error was **not** in Meg's Expert Pension Valuation adopted by the court. The Community Property share of the pension and corresponding Present Day Value was accurately calculated by Meg's Expert.

Jim asserts Meg urged the court to correct the error. While it is accurate to say Meg acknowledged the error, **there was nothing to correct**. The Expert Valuation presented in Ex. 18 was accurate. The Trial Court's self-prepared spreadsheet contained all of the correct numbers except one. That single erroneous number was not included in the calculation of the Net Total to Each. The number used in the calculation of the Net Total to Each was $170,823 and that number is

[14] More thorough analysis of the numbers related to the mathematical error and demonstration of how there was no substantive affect on the parties is set forth in Meg's Statement of the Case, above, and in relevant portions of Meg's Response to Motion for Reconsideration which is Appendix A to this Brief.

precisely the number calculated as the Present Day value of the Community Only share of the Pension. The Trial Court properly awarded that entire benefit to Meg. Meg never urged the trial court to change that award. See Appendix A, Meg's Response to Jim's Motion for Reconsideration.

Meg never urged the court to change its ruling after trial. The Trial Court's ruling was just and equitable and Meg accepted the Trial Court's ruling, even though it was slightly a different award than urged in Meg's Trial Brief. Confusion resulting from using one number out of Meg's Trial Brief, but not others, led to a mathematical error. The mathematical error did not affect the substantive rights of the parties and nothing in Jim's brief demonstrates any actual harm as a result of the error.

Jim says that "The Trial Court erred by failing to adjust the present cash value of Jim's union pension to reflect his actual monthly benefit of only $3,084" but this is quite simply false. Meg's Expert Pension Valuation clearly and unambiguously uses a total monthly benefit of $3,084 per month and from that derives a community portion of only $1,166 per month. Using the figure of $1,166 per month, Meg's Expert Pension Valuation sets the present cash value of $170,823. But those numbers are not in any way affected by the Trial Court's math. Those numbers are all entirely based upon correct math calculated by the Pension Expert. There is no error based upon the court's use in one place of the wrong number; there is no basis for changing the court's order.

Jim also misstates Meg's position when he claims that Meg "agreed that she should receive only one-half of the $1,166 community property portion of the pension." That is simply not true. Initially, Meg argued for one-half of the Union (community portion) pension **and** one-half of the State of Washington (community portion) pension. But the court instead gave Jim 100% of the State of Washington (community portion) pension and gave Meg 100% of the Union (community portion). This is appropriate. Pensions may be divided by awarding 100% of the pension to one party and a compensating asset or marital lien to the other party. *In re Marriage of Wright*, 78 Wn. App. 230, 896 P.2d 735 (1995); *DeRevere v. DeRevere*, 5 Wn. App. 741, 491 P.2d 249 (1971).

4. Respondent Cannot Raise New Issues Not Objected to At the Time of Trial On Appeal or Insert New Evidence On Appeal

a. Jim did not object to Meg's Expert Pension Valuation at Trial and Meg's Expert Pension Valuation Used the Same Methodology as Used by Jim's Expert

Jim argues the court erred by setting the equalization payment to Meg. Brief of Appellant at page 17. Essentially Jim argues for the first time on appeal that using the fractional approach to segregate community and separate pension interests was incorrect. Brief of Appellant, page 17. Jim's arguments attacks the Expert Pension Valuations submitted by Meg. But Jim failed to object to Meg's Expert Pension Valuations at any time or in any way at trial. Failure to object at trial amounts to a waiver and such objections made for the first time on appeal will not be considered. *Lubin*

v. Cowell, 25 Wn.2d 171, 185, 170 P.2d 301 (1946); *Drake v. Ross,* 3 Wn..App. 884, 886-887, 478 P.2d 251, 252 - 253 (1970). These arguments should be rejected. At trial, the dispute between the parties was not the methodology (i.e., fractional approach using the time rule method) of the valuation, instead, the dispute was the number of years used as the numerator in the fractional approach.

Jim's argument should be rejected because Meg's Expert Valuation Report using the fractional approach, or time rule method, was admitted at trial by stipulation. He made no objection to Meg's report. Jim provided no alternative calculation for the court. The fractional approach, or time rule method, is an appropriate method for segregating pensions and has been repeatedly approved. See, e.g., *Chavez v. Chavez*, 80 Wn.App. 432, 436, 909 P.2d 314, 316 (Div. 2) (1996) (explaining and approving the time rule method).

The Trial Court chose to believe the opinion presented by Meg's expert and relied upon Meg's Expert Valuation Reports to segregate the community and separate portions using the time rule method. RP 9-10, (11/16/2012). Meg's Expert Valuation report was admitted by stipulation. Jim's own expert also used the fractional approach – the only difference was the number of years used as the numerator of the fraction. As noted earlier, Jim's reliance on *Lindemann,* supra, is misplaced because this case involves a dissolution of a formal marriage and *Lindemann* was the breakup of a couple who never married.

4. Jim's Arguments Based Upon Citation to Evidence Not Before the Trial Court Should Be Rejected

Jim's final argument regarding the pension is all based upon new evidence which was not presented at the time of trial. See Brief of Appellant at pages 17 - 18, citing to CP 84 - 85. These citations to CP 84-84 are not to the trial record, but rather, the citations to CP 84-85 are to Jim's Motion for Reconsideration and new documents provided therewith which was not part of the trial record. The Trial Court repeatedly and unambiguously rejected Jim's attempt to submit new evidence post-trial:

The Court:	Does this information come from the Department of Retirement Systems or the pension people's statements or declarations that were submitted post trial; like, for this motion?
Counsel for Respondent:	The information, yes.
The Court:	It does?
Counsel for Respondent:	It does.
The Court:	Because I'll just be very frank –
Counsel for Respondent:	Okay.
The Court:	-- so that the Court of Appeals is real clear.
Counsel for Respondent:	Okay.
The Court:	I am not considering anything post trial.
Counsel for Respondent:	Okay.

The Court: So what my calculations and my spreadsheets come from is all of the evidence that was submitted at trial.

Counsel for Respondent: Uh-huh.

The Court: I don't think it's appropriate now to submit new evidence of maybe what separate component. And I want to be again very clear that my evaluation was to award 100 percent of the community portion, no separate. I believe that I'm on solid footing with the evidence that was presented at trial that $1,166.00 per month of the Western Washington Labor's Union Pension was – that's 100 percent of the community. No portion of that was separate. And I appreciate your argument, but I think it relies entirely on post trial submissions for this motion.

RP 7-8 (11/16/2012)

Both in the proceedings below and in this Appeal there was and is no basis for introduction or consideration of new evidence after trial. See, Petitioner's Motion to Strike New Evidence and Response to Motion for Reconsideration. CP 87-97. At the November 16, 2012, hearing Jim's trial counsel argued the evidence could not have been presented because Jim was contesting the existence of the relationship.

Counsel for Respondent: Without him knowing that [the court's decision on the length of the relationship], we don't know where you're going to draw the line in the sand as far as coming up with where the numbers go from there. So, I mean, was he supposed to present in the alternative, you know, five years, ten years, two years, three years? I mean he needed that component of your decision.

The Court: Well, I'm not going to – I'm not going to tell anyone how to practice law.

Counsel for Respondent: Okay.

The Court: Once it comes to me and the evidence is presented, then I start making findings of fact. I thought I did that fairly clearly in the letter opinion. And, again, if you choose to appeal, I want to be clear for the Court of **Appeals the primary document that I relied on not only in Ms. Byerley's testimony – but I think it was submitted by stipulation.** My memory is that I didn't hear from any of these experts directly. These Dock Street Litigation valuation documents, which are 18 through 20, the one that I relied on for the community portion of the union pension is Number 18 and it's very clear. 1,166.00 per month is 37.8 of the total benefit and it is all community. **I chose to believe that; that's how I got to my numbers, that's how I got to my spreadsheet[.]**

RP 9-10 (11/16/2012) (Emphasis added).

Jim's argument is absurd. Even though Jim was contesting the length of the relationship, he could have presented an alternative theory at trial. At a minimum he could have objected to Meg's calculation of the community interest. But he did neither. **Instead Jim chose to admit Meg's expert valuation of the community portion of his pension by stipulation and the court chose to believe Meg's valuation.** *Id.* Post-trial discovery of a new theory of recovery or second guessing a chosen trial strategy after the court's decision is not sufficient reason to either grant a new trial or reconsider a previously entered judgment. *Vaughn v. Vaughn,* 23 Wn.App. 527, 531, 597 P.2d 932 (1979) (plaintiff sued her

insurance company for bad faith in handling her tort action; after trial court ruled against her, she moved for reconsideration on an alternative theory of recovery). A litigant finding a judgment unsatisfactory, may not suddenly propose a new theory of the case after conclusion of the trial. *Int'l Raceway, Inc. v. JDFJ Corp.,* 97 Wn.App. 1, 7, 970 P.2d 343 (1999) (JDFJ moved for reconsideration alleging that it was entitled to treble rather than single damages under a different statute not raised in its complaint. The JDFJ court held 'JDFJs motion for reconsideration was in essence an inadequate and untimely attempt to amend its complaint in general, violating equitable rules of estoppel, election of remedies, and the invited error doctrine.') 97 Wn.App. at 7. Similarly here, the Trial Court did not err in rejecting Jim's new evidence and alternative theory of calculation of separate property presented for the first time in Jim's motion for reconsideration.

Jim has made no showing in his Appellate Brief why this new evidence was not provided at trial. Such new evidence is not appropriate for consideration by the Appellate Court. RAP 9.12. *Milligan v. Thompson,* 110 Wn.App. 628, 633, 42 P.3d 418, 421 (Div. 2) (2002). See also, *Colwell v. Holy Family Hosp.,* 104 Wn.App. 606, 613-14, 15 P.3d 210, *review denied,* 144 Wn.2d 1016, 32 P.3d 283 (2001) (trial court properly declined to consider evidence that party did not properly submit).

The Trial Court properly denied Jim's Motion for Reconsideration. RP 11 (11/16/2012). No error has been assigned to the denial of the

Motion for Reconsideration. This Court should reject all citation to and argument based upon evidence not submitted at trial.

G. The Trial Court Properly Entered A Qualified Domestic Relations Order (QDRO)

Jim once again misstates the record. Jim erroneously argues Meg was the irrevocable beneficiary of the survivor benefit of his Union pension. Brief of Appellant at page 20. **Appellant's brief is simply not accurate.** In handwritten language on Page 3 of the QDRO it clearly states: "Participant is entitled to 100% of the Survivor Annuity." Participant is defined as James Cail on Page 2 of the QDRO. CP 2-3. **Jim is not accurately reporting the record to this court and is actually arguing issues the trial court decided in his favor.**

Jim also argues adjusting Meg's benefit for cost of living increases was not intended by the trial court because it was not included in the Decree or the court's letter ruling. Jim cites no authority in support of his argument. The Court's letter ruling did not contain all language for every provision of the final orders. Every provision of a QDRO will not be duplicated in the Decree of Dissolution or there is no need for a QDRO.

Interpretation of a decree is a question of law. *In re Marriage of Gimlett,* 95 Wn.2d 699, 705, 629 P.2d 450 (1981). If a decree is clear and unambiguous, there is nothing for the court to interpret. *Byrne v. Ackerlund,* 108 Wn.2d 445, 453, 739 P.2d 1138 (1987). See also, *In re Marriage of Bocanegra* 58 Wn.App. 271, 275, 792 P.2d 1263,

1265 (1990) (upholding clear and unambiguous language awarding 100% of a cost of living increase to Wife).

Here the QDRO provides for cost of living increases to be applied proportionally to Meg's share of the retirement. That is a clear and unambiguous award. The fact it was not included in the Decree or letter ruling does not render the award of cost of living increases void. Jim objected to the cost of living increase provision in the QDRO. CP 66. But on this issue, the court granted the Meg the proportional cost of living increase on the retirement benefits awarded to her over Jim's objection. RP 12-13 (11/16/2012). In short, the court clearly manifested its intent to award the cost of living increase to Meg and it is not necessary for the same language to be included in the court's letter ruling or duplicated in the decree, so long as the court's intent is clear and unambiguous.

H. There is No Economic Disparity As A Result of the Court's Ruling

Jim claims Meg has gotten a "windfall." That is not the case. As discussed above, all of the pension interests were carefully segregated into community and separate portions using the fractional interest approach.

The economic disparity prior to the trial court's decision was clearly in **favor** of Jim. The community portion of Jim's total retirement was as follows: $370,404 ($125,325 SERS pension, $74,256 SERS defined contribution account and $170,823 Union pension). Ex. 18 and 19. As of the date of separation this $370,404 was less than half (only about 38%-40%) of the present day value of all his retirement benefits.

Jim had substantial more additional separate property retirement interests in excess of the $370,404 calculated as community. Ex. 18 and 19. In addition to the $370,404 community portion of the pension the Family Home with equity of $61,825 was awarded to Jim. Jim also had a Thunderbird worth $15,000 and a Dodge Dakota worth $6,300. **Prior to the court's award of the community portion of the Union retirement to Meg, Jim had approximately $452,529 in community property in his column, plus substantial separate property.**

Meg was in a vastly different and substantially inferior position economically. The total combined value of all her retirement benefits as of the date of separation in June 2011 was $55,232 with no other separate property retirement benefits whatsoever. She also received a car worth $10,425. **The community property in Meg's column prior to the court's award of the community portion of the Union retirement to Meg was only $65,657.**

There can be no question Jim was in the better economic position. Even after reducing Jim's and increasing Meg's awards by $170,823 to account for the community portion of the Union pension, Jim still had in excess of $281,000 (separate property excluded) and Meg had less than $236,500. This was award which was the slightly skewed division in favor of Jim as referenced by the Trial Court in the letter ruling. CP 61. The difference between Jim's award (community only) and Meg's award

was approximately $45,000 so the court ordered one-half as an equalization payment. This was a fair and equitable distribution.

Jim alleges "the Trial Court is permitting Meg to walk away from the marriage with the bulk of Jim's income." That is absolutely untrue. Jim receives $3,083 from the Union pension. CP 18. Jim receives in excess of $640 per month from his SERS retirement. The precise amount of the total SERS benefit is not part of the record because Meg never sought to be awarded the separate property portion of Jim's SERS retirement; however, as $640 represents only the 40% community portion, the total benefit is more than twice this amount.

Jim's monthly retirement income totals approximately $4,300 per month. The trial court awarded Meg $1,166 per month. That leaves Jim with approximately $3,134 per month, in addition to $181,999 in his SERS defined contribution account ($75,000 of which is community).

Jim is retired, but healthy and fully capable of working if he wished to do so. Jim is younger than Meg but Meg is still working. Meg is earning $4,965 per month. CP 61. With the $1,166 from the Union pension she is receiving approximately $5,200 per month. Jim has $3,200 from his retirement. He would need to earn only $2,000 working a part-time job to equalize his income. Alternatively, he could subsidize his income from the $181,999 SERS defined contribution account.

Meg has no such luxury of being able to choose to stop working. If she stopped working she would make $317 per month from her

retirement plus $1,166 from Jim's pension. Hence, if Jim and Meg both stopped working today Meg would have income of about $1,500 per month and Jim would have income of about $3,200. That economic disparity clearly favors Jim.

Because the court declined to award Meg any survivor annuity, after Jim passes she will have only the $317 per month. Meg, quite simply, is facing very dire circumstances unless she keeps working. She must keep working in order to survive. Jim, on the other hand, has the luxury of not working if he wishes and subsidizing his monthly income from the $181,999 retirement account, or working a part-time job to live a comfortable lifestyle. In short, there is no economic disparity and to the extent there is any, Meg is the economically disadvantaged party. Jim's protestations in this regard are simply not convincing.

I. The Court Should Award Meg Her Attorney's Fees On Appeal.

Jim has a retirement account of $181,999 he can use as a war chest for litigation. This includes separate and community property retirement savings but in all it is far more than Meg has available to her. The availability of separate property is a resource the court can consider when awarding fees one to the other. RCW 26.09.140.

Jim is assured a post-dissolution income of at least $3,134 per month for the remainder of his life. He can choose to work or not work depending upon how lavishly he wishes to live in retirement.

In contrast Meg has only $19,771 in her SERS defined

contribution account. Her monthly payment, should she retire, is only $317 per month. She had to take her case all the way through trial in order to obtain a payment of $1,166 per month and if Jim predeceases Meg that benefit goes entirely away.

Jim has already demonstrated a desire to litigate Meg into submission. Jim took a case to trial disputing that he and Meg were engaged in a committed intimate relationship prior to marriage despite the overwhelming evidence to the contrary. Finding of Fact 2.21, including subparts, at Pages 6-7. CP 117-118. Jim has not assigned error to this Finding. See also, Footnote 4, on Page 5 of Appellant's Opening Brief, stating: "Although Jim contested the nature and characterization of his relationship with Meg before their marriage at trial, he does not do so for purposes of this appeal."

Jim's voluntary choice not to work does not make him economically disadvantaged. Meg is actually the economically disadvantaged spouse. After consideration of Jim's resources versus Meg's she should be awarded her attorney's fees on this appeal.

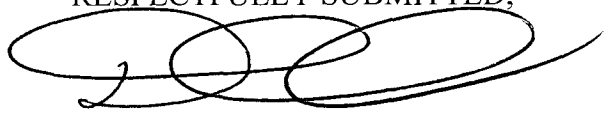
In addition, Jim has repeatedly misstated the record on appeal and has urged for appellate review of issues that actually had been ordered as he urges on appeal. This appeal is frivolous and Meg should be awarded her costs and attorney's fees.

V. CONCLUSION

For all of the reasons set forth above, Meg requests that the trial court be affirmed and that she be awarded her fees and costs on this appeal.

DATED this 12th day of August, 2013.

RESPECTFULLY SUBMITTED,



Daniel N. Cook, WSBA #34866
Attorney for Respondent Margaret Byerley

APPENDIX A

Portion (pages 3-5) of Margaret Byerley's Response to Motion for Reconsideration Addressing Mathematical Error

what factor under the court rule would support a motion for reconsideration. Respondent has not even cited CR 59 at all in this motion. Respondent simply makes a request for reconsideration without citation to any civil or evidentiary rule, procedural ground or authority whatsoever to support his request. A request unsupported by any legal authority should be denied.

A MINOR CLERICAL ERROR IS NOT A BASIS FOR RECONSIDERATION AND THERE HAS BEEN NO MATHEMATICAL ERROR AFFECTING THE RIGHTS OF THE PARTIES

Under CR 60(a) the court can correct clerical errors at any time. The rule states:

> (a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

There appears to be a very minor, clerical error, in the court's letter ruling. The clerical error is easily corrected and does not affect the substantive rights of the parties.

Mr. Cails Laborer's pension was referenced in Exhibits 18 and 37. Both Exhibit 18 and 37 were present day valuations by expert pension evaluators of the Laborers pension. **Exhibit 18 and 37 both used the exact same underlying data** (as will be discussed more fully below, Respondent's motion is really just an untimely challenge to the underlying data used in both expert pension valuation reports). Exhibit 18 and 37 both used the same methodology and calculation formulas. Exhibits 18 and 37 were both admitted by stipulation. The only substantive difference between Exhibits 18 and 37 were the dates when the community presumption began. After trial the court found the community presumption applied beginning in September 1996 so the valuations in Exhibit 18 were the correct valuations to use.

FAUBION, REEDER, FRALEY & COOK, P.S.
5920-100th Street SW, Ste 25
Lakewood, WA 98499
253-581-0660

In the letter ruling/spreadsheet, the court correctly indicated that:

The full monthly benefit was $3,084 per month.

The community portion is $1,166 per month.

The present day lump sum community value of the pension is $170,823.

All of the forgoing amounts are supported by the record at Exhibit 18.

The clerical error is in the amount stated as the separate property portion remaining to Mr. Cail each month. The court said that the remaining separate property portion was $2,501 per month; obviously $2,501 plus $1,166 does not total $3,084. But this is simply a clerical error and not a substantive or legal error affecting the rights of the parties.

It appears the amount of $2,501 came from Petitioner's trial brief where Petitioner urged the court to award Petitioner 18.9% of Mr. Cail's Laborer's pension. See Trial Brief of Petitioner filed August 16, 2012, at page 22. Had the court awarded 18.9% of the $3,084 per month to Ms. Byerley she would have received $583 per month. The difference between $3,084 and $583 is $2,501. Had the Court awarded Petitioner only 18.9% of the Laborers pension $2,501 would have been the remaining share awarded to Respondent.

But the court divided the assets somewhat differently than urged by Petitioner (and the court's distribution was generally simpler and required only one QDRO). Petitioner's request for 18.9% of the Laborer's pension was predicated on Petitioner's request for one-half of the community portion of Respondent's State of Washington pensions as well.

Since the court did not split Mr. Cail's State of Washington accounts the court also awarded Ms. Byerely more than 18.9% of the Laborer's pension. The court offset the community interest in the Laborer's pension against the community interest in the State of Washington retirement accounts. The court awarded 100% of the community interest in the

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5920-100th Street SW, Ste 25
Lakewood, WA 98499
253-581-0660

State of Washington pensions to Mr. Cail and 100% of the community interest in the Laborer's pension to Ms. Byerly. This is perfectly acceptable and the result is just and equitable. But since the court awarded 100% of the Laborer's pension to Ms. Byerly The minor clerical error arose by applying 18.9% (one-half of the community interest) instead of 37.8% (100% of the community interest) when subtracting and stating Mr. Cail's remaining monthly amount (and the monthly amount available to Mr. Cail from the State of Washington pension is higher than originally requested by Petitioner).

The result reached by the court is fair and equitable. The court correctly valued the lump sum present day value of the community portion of the defined benefit account as $125,325. This is supported by Exhibit 19. The court correctly valued the lump sum present day value of the community portion of the defined contribution account as $74,256. This is supported by Exhibit 19. The court awarded **all** (100%) of these community assets to Mr Cail. The total present day value of these community assets is $199,581. Then, instead of only awarding 18.9% (one-half of the community) of the Laborers pension to Ms. Byerley, the court awarded 37.8% (100% or the entire community interest) in the Laborers pension to Ms. Byerley which had a present day value of $170,823 (community only). In short, the court awarded Ms. Byerely $170,823 in present day value from the Laborer's pension and $199,581 in present day value from the State of Washington pension to Mr. Cail The other assets (not discussed here) and a lump sum transfer payment were then utilized by the court to achieve an over fair and equitable (if not entirely equal) division of the property.

The clerical error clearly did not affect the substantive rights of the parties. The court should correct the clerical error and enter the proposed findings and decree.

FAUBION, REEDER, FRALEY & COOK, P.S.
5920-100th Street SW, Ste 25
Lakewood, WA 98499
253-581-0660

DECLARATION OF TRANSMITTAL

I certify under penalty of perjury that on the 8th day of August 2013, I transmitted a copy of this BRIEF OF RESPONDENT to the individuals and via the method(s) designated below:

Jeffrey S. Floyd Jeffrey S. Floyd & Associates, PLLC 555 West Smith Street, Suite 106 Kent, WA 98032	Transmitted via: ☒ First-Class US Mail ☐ Facsimile to (206) 575-7563 ☒ Email to jeff@jsfloydlaw.com ☐ Legal Messenger for Hand Delivery
Emmelyn Hart Talmadge/Fizpatrick 18010 Southcenter Parkway Tukwila, WA 98188	Transmitted via: ☒ First-Class US Mail ☐ Facsimile to (206) 575-1397 ☒ Email to emmelyn@tal-fitzlaw.com ☐ Legal Messenger for Hand Delivery
Original hand delivered to: Court of Appeals, Division II Clerk's Office 950 Broadway, Suite 300 Tacoma, WA 98402-4427	

Dated at Lakewood, Washington this 8th day of August 2013.

Sally DuCharme

Sally DuCharme, Legal Assistant